IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERNATIONAL REFUGEE ASSISTANCE PROJECT, *et al.*,

Plaintiffs-Appellees,

v.

DONALD J. TRUMP, *et al.*,

Defendants-Appellants.

No. 17-1351

DEFENDANTS' OPPOSITION TO JOHN DOE #8'S MOTION TO INTERVENE

Three days after defendants filed their reply brief in this highly expedited appeal, and only 14 days before oral argument before the *en banc* Court, a plaintiff (John Doe #8) in *Sarsour v. Trump*, No. 1:17-cv-00120 (E.D. Va.), moved to intervene in the appeal. The motion is untimely, wrongly seeks to introduce a new issue that was not decided by the district court or briefed by the parties on appeal, and represents an improper collateral attack on the *Sarsour* district court's holding that the plaintiffs there failed to demonstrate a likelihood of success on the merits on that issue. The motion should be denied. Intervention at this late date would be highly disruptive to the parties and the Court, and is not necessary to protect John Doe #8's interests in his separate lawsuit.

STATEMENT

1. This case involves a challenge by various parties to Executive Order 13,780 (2017) (Order), Section 2(c) of which suspends the entry of certain foreign nationals from Iran, Sudan, Syria, Libya, Somalia, and Yemen for 90 days while the new Administration reviews the Nation's screening and vetting procedures to ensure that they adequately detect terrorists.

The district court entered a nationwide preliminary injunction on March 16, 2017, barring enforcement of Section 2(c) of the Order. Defendants filed a notice of appeal on March 17, 2017, and shortly thereafter, moved for accelerated case processing, with a suggested opening brief due date of March 24, 2017; a response brief due date of March 31, 2017; a reply brief due date of April 5, 2017; and oral argument as soon as practicable following the completion of briefing. The court granted the motion, but made the response brief due April 14, 2017, and the reply brief due April 21, 2017. In the same order, this Court also established an expedited schedule for responding to defendants' motion for a stay pending appeal, with briefing on the stay to be completed by April 5, 2017. On March 23, 2017, this Court calendared this case for oral argument on May 8, 2017. Subsequently, the Court *sua sponte* granted initial hearing en banc.

2. John Doe #8, along with other plaintiffs, filed a separate action in the Eastern District of Virginia challenging the previous Executive Order. See *Sarsour*

v. Trump, No. 1:17-cv-00129 (E.D. Va.). The motion to intervene describes John Doe #8 as a lawful permanent resident of Sudanese national origin who resides in Missouri and who has filed a marriage petition for his alien wife, which has been approved. John Doe #8 alleges that his wife's visa application remains pending, and that he believes the application will be denied under the new Order based on his wife's Muslim religion and her Sudanese national origin.

After Executive Order 13,780 was issued, the *Sarsour* plaintiffs filed an amended complaint along with a motion for a temporary restraining order or a preliminary injunction. The amended complaint alleges that the Order violates the Establishment Clause, the Equal Protection component of the Fifth Amendment; the Administrative Procedure Act, 5 U.S.C. § 706, and Section 1152(a)(1)(A) of the Immigration and Nationality Act. The district court denied the *Sarsour* plaintiffs' motion for temporary or preliminary relief, however, finding that those plaintiffs failed to show a likelihood of success on the merits of any of their claims; that the balance of the equities did not tip in their favor; and that the public interest did not support temporary or preliminary relief. See Mem. Op. (Mot. App. B).

The *Sarsour* plaintiffs subsequently consented to a motion (which the court granted) to stay proceedings in that case in light of the nationwide preliminary injunction entered in this matter and this expedited appeal.

3. John Doe #8 has moved for leave to intervene in this appeal. The motion, which attaches his proposed brief, was filed on April 24, 2017—five days after the deadline for amicus briefs in this appeal, and three days after defendants filed their reply brief on appeal. The motion asserts that intervention is necessary because of the supposed need to introduce a new issue into this appeal: whether the new Order complies with the APA. John Doe #8 asserts that "the existing parties * * * did not address the APA issue in their primary briefs on appeal," Mot. 10, and his proffered brief elaborates that resolution of his APA arguments could have "[b]road [i]mplications" for claims "that have yet to come before this Court," such as challenges to the refugee provisions of the Order, Section 6. Br. 9. The district court in this case did not enjoin Section 6, and that provision of the Order is not at issue in this appeal.

ARGUMENT

A. To establish that intervention as of right is warranted, on appeal or in district court, a party must submit a timely motion demonstrating that the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; that the disposition of the action may impair or impede the party's ability to protect that interest; and that the applicant's interest is not adequately represented by existing parties. *See Consol. Gas Elec. Light & Power*

Co. of Baltimore v. Pennsylvania Water & Power Co., 194 F.2d 89, 91 (4th Cir. 1952) (discussing Fed. R. Civ. P. 24(a)(2)).

John Doe #8 cannot satisfy any of these requirements. The motion is untimely, and insertion of a new issue into this appeal at this very late date would be disruptive to the court and the parties and would impair preparation for the upcoming oral argument. The motion also lacks merit because it is principally grounded on the supposed need to introduce a new legal issue—whether the new Order complies with the APA—that is not before the Court and is unlikely to be decided in this appeal. At bottom, the motion to intervene and proposed intervention brief constitute an inappropriate collateral attack on the district court's denial of plaintiffs' motion for injunctive relief in *Sansour*. The motion should be denied.

1. John Doe #8's motion for intervention is untimely. The motion was filed after the completion of the expedited briefing schedule the Court ordered for this appeal, and only days before oral argument is scheduled before the en banc Court. Granting the motion, which is principally grounded on the asserted need to introduce a new issue into the appeal that has not been briefed by any of the parties (the *Sarsour* plaintiffs' APA claim), would be highly disruptive at this very late stage, and would impair the Court's and the parties' efforts to prepare for oral argument.

John Doe #8 contends that his intervention motion is timely because he did not learn that plaintiffs would not make an APA argument in this appeal until April 14, when plaintiffs' brief was filed. Mot. 12. It was evident well before that date, however, that the order currently on appeal did not reach that issue, and that the parties had not briefed that question in the context of that order. Furthermore, even after plaintiffs' opening appeal brief was filed, John Doe #8 waited ten days to file his motion to intervene, three days after defendants had filed their reply brief. The motion also does not reflect any earlier effort on John Doe #8's part to consult with counsel for plaintiffs to learn what issues they planned to brief. The motion is far too late to be considered without disrupting the briefing schedule for this appeal, as well as the parties' and the Court's preparations for oral argument. The motion should be denied based on its lack of timeliness alone. *See League of United Latin American Citizens v. Wilson*, 131 F.3d 1297, 1302 (9th Cir. 1997) ("[I]f we find that the motion to intervene was not timely, we need not reach any of the remaining elements of Rule 24.") (brackets and internal quotation marks omitted).

2. John Doe #8 also lacks a significant, protectable interest in the outcome of this appeal that the disposition of the action may impair or impede. The primary ground he offers in favor of intervention is the need to address the *Sarsour* plaintiffs' APA challenge to the Order. The district court in *Sarsour* held that those plaintiffs failed to demonstrate a likelihood of success on the merits of that claim, however, see Mot. App. B, pp. 16-17, and John Doe #8's attempt to intervene in this appeal to raise that issue is an inappropriate collateral attack on that ruling, which the *Sarsour* plaintiffs can challenge after the district court has entered final judgment. See *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976) (noting that "the general principle is to avoid duplicative litigation" in two federal district courts, in order to further "considerations of '[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation'") (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

Because the APA issue that John Doe #8 seeks to present is not currently presented in this appeal, this Court's disposition of the present appeal will not have any likely adverse effect on John Doe #8's ability to protect his interests in *Sarsour*. Thus, while the prospect of stare decisis may "supply the requisite practical impairment warranting intervention as of right," *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), the outcome of *this* appeal will likely not foreclose John Doe #8's APA claim in *Sarsour*. See Order, Dkt. #203 (Apr. 21, 2017), *State of Hawaii v. Trump*, No. 17-15589 (9th Cir.) (denying intervention in appeal of district court nationwide injunction for similar reasons) (copy attached as addendum).[1]

3. John Doe #8 also has failed to show that the parties to this appeal do not adequately represent his interests. To the extent he asserts an interest in the presentation of his statutory claims under 8 U.S.C. § 1152, appellees have fully briefed that issue on appeal. John Doe #8 does not contend that appellees' briefing on that issue is deficient. Instead, he argues that his statutory claims under Section 1152 also are independently actionable under Section 706 of the APA, see Mot. 5, because the Order's asserted failure to comply with Section 1152 constitutes action that is arbitrary and capricious and lacks a rational basis. See *Sarsour* Amended Compl. ¶ 118. As noted, however, that argument is not currently presented on appeal

[1] Defendants also note that John Doe #8's APA challenge to the issuance of the Executive Order cannot prevail, given that "the President's actions [a]re not reviewable under the APA." *Sarsour* Mem. Op. (Mot. App. B. 17) (quoting *Dalton v. Spencer*, 511 U.S. 462, 469 (1994)). John Doe #8 argues that the *Sarsour* APA claim also "sought to prohibit the agency defendants * * * from implementing the Order as directed," Mot. App. A at 7, but he appears to concede, appropriately, that this claim fails to identify any "final agency action" reviewable under the APA. *Id.* at 8. He also suggests that a court could review agencies' implementation of the Order under section 706 of the APA as "agency action made reviewable by statute," *id.*, but the statute he identifies (8 U.S.C. § 1152) does not purport to authorize judicial review of any agency action. Moreover, the fact that section 1152 does not preclude judicial review does not mean it authorizes review. *Cf.* Mot. App. A at 13. Neither of the cases he cites, *see id.* (citing *Japan Whaling Ass'n v. Amer. Cetacean Soc'y*, 478 U.S. 221, 239 n.4 (1986), and *Block v. Community Nutrition Inst.*, 467 U.S. 340, 345 (1984)), holds to the contrary, and 5 U.S.C. § 701(a) does not authorize judicial review of agency action in the absence of *final* agency action as defined in 5 U.S.C. § 706.

and this Court's disposition of the appeal will not prejudice his ability to pursue the argument in *Sarsour*. For all these reasons, intervention as of right should be denied.

B. Permissive intervention also should be denied. John Doe #8's unwarranted delay in seeking to intervene in this litigation, and the consequent prejudice to the parties that would result from his eleventh-hour appearance, also preclude permissive intervention. Permissive intervention, at this late date, also would disrupt the briefing schedule in this case and the parties' and the Court's preparation for oral argument on May 8, 2017; wrongly add new issues to this appeal; end-run the *Sansour* district court's handling of John Doe #8's APA claim; and represent the kind of duplicative litigation the Supreme Court has held impermissible. John Doe #8's alternative request that the Court accept his proposed brief as an amicus brief also is untimely, given that he filed the brief five days after the deadline for amicus briefs in this appeal. At a minimum, however, John Doe #8's participation in this case should be limited to filing as an amicus curiae, rather than as an intervening party.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the Court deny John Doe #8's motion for leave to intervene.

Respectfully submitted,

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APRIL 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2017, I electronically filed the foregoing Opposition by using the Court's CM/ECF system, and that service of the Opposition on counsel will be accomplished by that system.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), I hereby certify that the foregoing opposition complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 27(e)(1)(E) and the type-volume limitations of Federal Rule of Appellate Procedure 27(e)(2). The Opposition contains 2254 words as calculated by Microsoft Word, and has been prepared in a proportionately spaced typeface using 14-point Times New Roman font.

s/Lowell V. Sturgill Jr.
Lowell V. Sturgill Jr.

ADDENDUM

Order, Dkt. #203 (Apr. 21, 2017), *State of Hawaii v. Trump*, No. 17-15589 (9th Cir.)

FILED

APR 21 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

STATE OF HAWAII; ISMAIL ELSHIKH,

Plaintiffs-Appellees,

ALI PLAINTIFFS; JOSEPH DOE; JAMES DOE; EPISCOPAL DIOCESE OF OLYMPIA,

Intervenors-Pending,

v.

DONALD J. TRUMP, in his official capacity as President of the United States; U.S. DEPARTMENT OF HOMELAND SECURITY; JOHN F. KELLY, in his official capacity as Secretary of Homeland Security; U.S. DEPARTMENT OF STATE; REX W. TILLERSON, in his official capacity as Secretary of State; UNITED STATES OF AMERICA,

Defendants-Appellants.

No. 17-15589

D.C. No.
1:17-cv-00050-DKW-KSC
District of Hawaii,
Honolulu

ORDER

The *Ali* Plaintiffs' motion to intervene, Dkt. No. 20, and the *Doe* Plaintiffs' motion to intervene, Dkt. No. 57, are denied for the purposes of this expedited appeal only. *See Bates v. Jones*, 127 F.3d 870, 873 (9th Cir. 1997) ("Intervention at the appellate stage is . . . unusual and should ordinarily be allowed only for imperative reasons." (internal quotation marks omitted)); Fed. R. Civ. P. 24(a)(2) (intervention as of right must be given where "disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest"); Fed. R. Civ. P. 24(b)(3). The interests of the *Ali* Plaintiffs may be pursued through their case, *Ali v. Trump*, No. 2:17-cv-00135-JLR (W.D. Wash. filed Jan. 30, 2017), and possibly on appeal to our court. The same goes for the *Doe* Plaintiffs, who may protect their interests in their case, *Doe v. Trump*, No. 2:17-cv-00178-JLR (W.D. Wash. filed Feb. 7, 2017).

Although "[t]he prospect of stare decisis may, under certain circumstances, supply the requisite practical impairment warranting intervention as of right," *United States v. Stringfellow*, 783 F.2d 821, 826 (9th Cir. 1986), *vacated on other grounds*, 480 U.S. 370 (1987), the outcome of this appeal will not "for all practical purposes . . . foreclose" the *Ali* and *Doe* Plaintiffs' claims, *Blake v. Pallan*, 554 F.2d 947, 954 (9th Cir. 1977). *See In re Estate of Ferdinand E. Marcos Human Rights Litig.*, 536 F.3d 980, 986 (9th Cir. 2008) (noting that a non-party's concerns about the precedential effect of an opinion may not warrant intervention).

The *Ali* and *Doe* Plaintiffs may file briefs as amici curiae no later than Wednesday, April 26, 2017.

FOR THE COURT:

MOLLY C. DWYER
CLERK OF COURT

By: Omar Cubillos
Deputy Clerk
Ninth Circuit Rule 27-7